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Supreme Court of the United States

October Term, 1954

No. 284

MARIE BETTINGER and LAWRENCE E. BETTINGER
Defendants - Petitioners
and CLARA EGGE and LILLIAN HANSON,
Interveners - Petitioners,
vs.
NORTHWESTERN NATIONAL CASUALTY COMPANY
and NORTHWESTERN NATIONAL INSURANCE COMPANY,
Plaintiffs.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Respondents in their brief have not met or answered even one of petitioners' four reasons why certiorari should be granted. They have failed to show any justification for a Federal procedure in which it was decided between the parties below as to the controlling fact of controversy, namely, ownership, on one day, and on the next day that such ownership was not so; nor have they met the arguments that the decision below is in conflict with decisions of this Court as

well as the Courts of other Circuits. And it is impossible to understand how the law of cases from Pennsylvania, California, Iowa and the restatement of the law of judgments establishes the state law of *res judicata* in Minnesota, which the Courts below were obligated to follow. And finally, it should be observed that neither respondents nor the Courts below explain away the effect of Minnesota Statutes Annotated, Sec. 170.40, subd. 6, (1), where it reads:

> "Subd. 6. Every motor vehicle liability policy shall be subject to the following provisions which need not be contained therein:
>
> (1) * * * no statement made by the insured or on his behalf *and no violation of said policy shall defeat or void said policy.*"

It should be observed that no Minnesota Court or Federal Court in Minnesota has construed the above section as contended for by respondents. *The section relates to all motor vehicle insurance policies issued in Minnesota,* whether assigned risk policies or not. It was derived from earlier Minnesota insurance regulation sections.

The truth is that the Insurance Companies slept on their rights. At page 5 of their brief, it is suggested that the Bettingers should have *offered* "to allow such defense to be undertaken under a reservation of rights." But the policy was prima facie in full effect and force at the time the negligence action was commenced and tried. The Insurance Companies' refusal to defend was a breach of the policy duty; and the initiative should have come from the insurers.

Moreover, nearly a year elapsed between the time the Insurance Companies first notified Mrs. Bettinger of their attempted cancellation of the policy and the time they began their suit for declaratory judgment. It was nearly three

months after the suit for negligence was commenced by Egge and Hanson until the Insurance Companies even began their action for declaratory judgment. Having slept until two months before the negligence action was up for trial, before they commenced their declaratory judgment action, they then expected the declaratory judgment action to be tried first. As so lucidly stated by Woodrough, J. in his dissent:

> "The Court, on consideration, declined the Insurance Companies' request to take their case up first and it thereby put them on notice that a trial and judicial determination of the fact issue as to ownership of the car would be made in damage cases."

Having slept on their rights, the Insurance Companies should not be heard to complain that the rule of *res judicata* should not apply to their situation. And this has been Federal law at least since the last paragraph of *United States v. Munsingwear, Inc.*, 340 U. S. 36 (1950).

The essential problem is whether an indemnitor who refuses to defend the first action and is put on notice of the fact that issues essential to its liability under the policy will be tried, can stand by to allow those issues to be conclusively litigated in a solemn final determination so that liability is imposed: and then later go back before the same Court and assert that such determinations are not binding or such facts are not true. The Minnesota Safety Responsibility Act establishes the driver as an agent of the owner. Automobile liability policies issued in the state are required to conform to such statute in that liability arising out of the *use* of the automobile as well as the ownership shall be insured. It seems inconceivable to establish a Federal practice and Federal law which permits circumvention of the intent and purpose of

such highway safety statutes by permitting successive relitigation of the issue of ownership once such issue has been litigated under conditions which gave the Insurance Companies an ample opportunity to defend and protect their rights.

In these days of ever increasing automobile speeds and accidents, the importance of valid insurance becomes a matter of overwhelming importance for the protection of the victims of these accidents, as well as for the protection of the owner from financial ruin. All Courts should be, and most Courts are, fully aware of the problem, which has now far transcended the fields of merely private contract. To hold, as the Courts below have done, that a party can be held liable on one theory, yet be deprived of the insurance against that liability—for which she has paid the premium—on a diametrically opposed theory, is enough to shock the conscience; but here it is aggravated by the fact that Mrs. Bettinger, the insured, did everything within her power, even in retrospect, to avoid that result. The Court of Appeals in the majority opinion speaks of the embarrassment which the Insurance Companies might be under to assume the defense; but it seems to have given little, if any, consideration to the very acute embarrassment of a policy holder, denied the protection of his policy on grounds which not only are not in the policy but which are negated by the results of the very litigation where the liability is imposed. The law of Minnesota, which the Courts below were supposed to be applying, holds no such thing and neither do the laws of the forum. The glaring miscarriage of justice in the result here is exceeded only by the glaring unlawfulness of the result.

Like highway safety laws and financial responsibility statutes have been enacted in at least thirty-nine states, the District of Columbia, and Hawaii. The establishment of a Federal procedure which would permit the Insurance Companies to circumvent by procedural routes the obligations imposed by such statutes and by their contracts, presents an important question in the administration of justice and a grave issue involving safety on our highways. Accordingly, the petition for certiorari should be granted.

Respectfully submitted,

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ON THE BRIEF